No. 89-692

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In The

Supreme Court of the United States

October Term, 1989

BIG APPLE INDUSTRIAL BUILDINGS, INC., AROL I. BUNTZMAN and MARTIN WILLIAM HALBFINGER, ESQ.,

Petitioners,

vs.

THE PROCTER & GAMBLE COMPANY and RIVERVIEW PRODUCTIONS, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONERS

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Respondents' brief in opposition ("P&G Br.") raises several new arguments, necessitating the instant reply.

1. Petitioners did assert below the argument that the RICO "pattern" element is unconstitutionally vague.

Respondents assert that petitioners' argument that RICO's "pattern of racketeering activity" element is unconstitutionally vague was "never presented to the Court of Appeals" (P&G Br. 15). On the contrary, this argument was made to the Court of Appeals in the petition for rehearing submitted by petitioners Big Apple Industrial Buildings, Inc., Arol I. Buntzman and Martin William Halbfinger, Esq. (the "Big Apple petitioners").

Moreover, prior to that petition, this argument would have been premature, as it was not then clear that this Court was unable to give sufficient meaning to the "pattern of racketeering activity" element of a RICO claim to give constitutionally required fair notice of proscribed activity. The vagueness in the "pattern" element as applied here only became crystallized after this Court's decision in *H.J. Inc. v. Northwestern Bell Telephone Co.*, 109 S. Ct. 916 (1989), which was decided after briefing to the Court of Appeals, but before the petition for rehearing was submitted by the Big Apple petitioners. Accordingly, this argument was not only raised in the Court of Appeals, but at the earliest appropriate time.

2. RICO is not rendered constitutional because the mail and wire fraud predicate acts are not vague.

Relying on *United States v. Seregos*, 655 F.2d 33, 36 (2d Cir. 1981), *cert. denied*, 455 U.S. 940 (1982), respondents claim that "fair notice challenges have been rejected where the presence of some other statute or parallel enforcement scheme unequivocably marked the defendant's conduct as wrongful, so that there was no doubt he had made a conscious decision to violate *some* law."

(P&G Br. 17).[1] This is a misreading of *Seregos*, which stands for no such sweeping proposition.

Rather, in *Seregos* the court rejected a claim of lack of fair notice that the Travel Act applied to commercial bribery because "there is nothing vague or indefinite about 'bribery' as used in the Travel Act." 655 F.2d at 36. More particularly, the court held that the notice provided was sufficient even if it was not clear whether the Travel Act applied to commercial bribery and bribery of a public official or only the latter. *Id.* In *Seregos*, defendant had violated the very law — bribery — as to which he was claiming a lack of fair notice.

Respondents' argument by analogy would be well taken if all that RICO required was multiple acts of mail and wire fraud — then the Big Apple petitioners would have had fair notice. That however, is not enough: a RICO violation requires a "pattern" of such activity. Unlike the defendant in *Seregos*, the Big Apple petitioners had no fair notice of an element of the proscribed conduct, that their alleged acts could constitute a "pattern" — a word that was shown in *H.J. Inc.* to be bereft of minimal constitutional standards of fair notice.

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1. *United States v. Ragen*, 314 U.S. 513, 524 (1942), also relied upon by respondents (P&G Br. 17-18), is simply irrelevant. There, a tax evasion statute was found not to be unconstitutionally vague first because it provided some standard, one of reasonableness, and second because the evidence of consistent conversion of profits to "commission" expenses made it clear that defendant was on notice that its conduct might violate the statute. Here, in contrast, there is no standard to measure the "pattern" element. *H.J. Inc.*, 1095 S. Ct. at 2909. *See, e.g., Collins v. Kentucky*, 234 U.S. 634, 638 (1914) (statute requiring defendant to know "real value" of goods held to be unconstitutionally uncertain because it prescribed no standard of conduct that was possible to know).

3. The Court's decision in *Fort Wayne Books, Inc.* is irrelevant here.

Respondents rely on *Fort Wayne Books, Inc. v. Indiana*, 109 S. Ct. 916 (1989) in arguing that this Court has upheld the "pattern" element in the face of a vagueness attack (P&G Br. 18-19). In *Fort Wayne* however, this Court did not address the pattern requirement. Rather, the Court rejected the attack on the RICO statute for vagueness in its use of obscenity statutes as predicate acts. This Court simply upheld the constitutionality of the Indiana obscenity laws based on its previous decisions upholding obscenity laws (109 S. Ct. at 924), and specifically did not address the issue of the constitutionality of the "pattern" element. 109 S. Ct. at 925 n. 7. In short, the statute was not under attack because of the vagueness of the "pattern" element, and *Fort Wayne* is thus inapposite.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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